Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986
No. 86-1218

E.F. HUTTON & COMPANY, INCORPORATED
AND PETER PANOS,

Petitioners,

vs.

FREDERICK J. WOLFE AND
HEATHER B. WOLFE, HIS WIFE,

Respondents.

MERRILL LYNCH, PIERCE, FENNER &
SMITH INCORPORATED,

Petitioner,

vs.

JOSEPH GORMAN,

Respondent.

GORMAN'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

KAREN A. GIEVERS, ESQUIRE
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Question Presented for Review

The question presented in this case is whether the circuit court erred in affirming the trial court's denial of Merrill Lynch's motion to compel arbitration of Gorman's federal securities law claims.

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Statement of the Case

Gorman sued Merrill for its mishandling of his funds and account. Gorman stated claims against Merrill for violations of the Securities Exchange Act of 1934 and the related rules and regulations of Chapter 517 of the Florida Statutes, for fraud and breach of fiduciary duty and, under Chapter 812 of the Florida Statutes, for civil theft. Merrill moved to compel arbitration, relying on its form language. Merrill made no showing of any compliance with the mandatory disclosure requirements of SEC Rule 15c2-2, 17C.F.R. §240.15c2-2; reflecting the Securities Exchange Commission's position that arbitration of customers' federal securities law claims could not be compelled pursuant to

pre-dispute "agreements" to arbitrate.

On Merrill's motion the district court ordered arbitration of the state law claims, but denied arbitration of Gorman's federal securities law claims. Gorman v. Merrill Lynch Pierce Fenner & Smith, 609 F. Supp. 1054 (S.D. Fla. 1985). Merrill appealed that part of the order denying arbitration of Gorman's federal law claims. After the filing of the briefs and with the oral argument scheduled, Merrill successfully asked the circuit court to consolidate Gorman with E.F. Hutton v. Panos.

The circuit court affirmed the district court's ruling in the consolidated cases, denying arbitration of Gorman's and Wolfe's federal securities law claims. Wolfe v. E.F. Hutton & Co., Inc., 800 F.2d 1032 (11th

Cir. 1986) (en banc). In its opinion, the court recognized the propriety of Gorman's position asserting that the compelled arbitration of the 10b-5 claim is precluded by SEC Rule 15c2-2, 17 C.F.R. Sec. 240.15c2-2; however, the court found it unnecessary to reach the issue. Id., at 1038-1039, fn 9.

Merrill now asks this Court to review the circuit court's ruling, citing inter-circuit conflict and the significance of the arbitrability issue.

Summary of Argument

The circuit court properly affirmed the right of access to the federal courts, and properly denied the brokerage houses' motion to compel arbitration of their customers' federal securities law claims. Certiorari should be denied.

Argument

Gorman's constitutionally protected right to a federal court jury trial of his federal securities claims is intact and is further protected by the provisions of the 1934 Securities and Exchange Act vesting the courts with exclusive jurisdiction over those claims. 15 U.S.C. §78aa. Gorman's rights to have a jury of his peers decide the propriety of Merrill's conduct in light of the 1934 Act is bolstered by the express provisions of SEC Rule 15c2-2.

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa vests the federal courts with exclusive jurisdiction of claims brought pursuant to the 1934 Act and the rules and regulations promulgated thereunder.

Section 29 of the Securities Exchange Act of 1934 makes unenforceable any agreement purporting to waive any provision of the Act, or the related rules and regulations. 15 U.S.C. §78cc. The Securities Echange Commission also had recognized the unenforceability of pre-dispute agreements purporting to require arbitration of federal securities law claims; in fact, a brokerage house's failure to tell its customers of that compelled arbitration of federal securities claims is prohibited consitutes a fraudulent misrepresentation. SEC Rule 15c2-2.

The 1934 Act came into existence nine years after Congress' passage of the Federal Arbitration Act relied upon by Merrill Lynch and E.F. Hutton. The 1934 Act reflects the importances of the

federal judicial forum to the Congress' efforts to regulate and control the country's securities markets. That Congress knew of the courts refusal to enforce pre-dispute arbitration agreements and chose not to amend the pertinent statutory provisions relating to customers like Gorman, despite its amendments to other portions of the 1934 Act, cannot be denied.

Gorman cannot deny the post-Byrd[1] existence of inter-circuit conflict. Gorman also cannot in good faith deny the importance and significance of his constitutionally and statutorily protected right of access to the courts and a jury trial. Nevertheless, the record before the court below clearly

supports the circuit court's ruling, and warrants denial of the brokerage houses' petition for writ of certiorari.

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[1]Dean Witter Reynolds, Inc. v. Byrd, ___ U.S. ___, 105 S.Ct. 1238 (1985)

Conclusion

The Eleventh Circuit's ruling denying the compelled arbitration of federal securities law claims should be affirmed. The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished by hand delivery this 10th day of April, 1987 to BENNETT FALK, ESQUIRE and KEITH OLIN, ESQUIRE, Ruden, Barnett, McClosky, Schuster & Russell, P.A., Attorneys for Petitioners, Suite 2020 One Biscayne Tower, 2 South Biscayne Boulevard, Miami, Florida 33131 and by express mail to ELMO R. HOFFMAN, ESQUIRE, Parker, Johnson, Owen & McGuire, Attorneys for Respondents Frederick J. Wolfe and Heather B. Wolfe, 108 East Hillcrest Street, Orlando, Florida 32801.

KAREN A. GIEVERS, P.A.

By: Karen A. Gievers
KAREN A. GIEVERS

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Statuory Provisions Involved

15 U.S.C. §78aa:

> The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations there- under, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder..."

15 U.S.C. §78cc(a):

> (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or rule or regulation thereu- nder, or of any rule of an exchange required thereby shall be void.

17 C.F.R. §240.15c2-2:

(a) It shall be a fraudulent, manipulative or deceptive act or practice for a broker or dealer to enter into an agreement with any public customer which purports to bind the customer to the arbitration of future disputes between them arising under the Federal securities laws, or to have in effect such an agreement, pursuant to which it effects transactions with or for a customer.

(b) Notwithstanding paragraph (a) of this section, under December 31, 1984 a baroker or dealer may use existing supplies of customer agreement forms if all such agreements entered into with public customers after December 28, 1983 are accompanied by the separate written disclosure:

> Although you have signed a customer agreement form with FIRM NAME that states you are required to arbitrate any future dispute or controversy that may arise between us, you are not required to arbitrate any dispute or contro- versy that arises under the federal securites laws but instead can resolve any such dispute or

controversy through litigation in the courts.

(c) A broker or dealer shall not be in violation of paragraph (a) of this section with respect to any agreement entered into with a public customer prior to December 28, 1983 if:

(1) Any such public customer for whom the broker or dealer has after July 1, 1983

(i) carried a free credit balance, or

(ii) held securities for safekeeping or as collateral, or

(iii) effected a securities transaction is sent, no later than December 31, 1984 the disclosure prescribed in paragraph (b) of this section, or

(2) Any other public customer is sent upon the completion of his next transaction pursuant to such agreement, the disclousre prescribed in paragraph (b) of this section.